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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHAMEIKA MOODY as an individual and on
behalf all of others similarly situated,

Plaintiff,
vs.

CHARMING SHOPPES OF DELAWARE,
INC., a corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: C 07-06073 MHP

**PLAINTIFF'S OPPOSITION TO
DEFENDANT CHARMING SHOPPES OF
DELAWARE, INC.'S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION
PURSUANT TO F.R.C.P. RULE 12(B)(2).**

**[CONCURRENTLY FILED DECLARATION OF PETER
M. HART]**

**JUDGE: HON. MARILYN HALL PATEL
DATE: FEBRUARY 11, 2008
TIME: 10:00 A.M.
COURTROOM: 15**

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OPPOSITION TO EX PARTE APPLICATION

I. INTRODUCTION

Plaintiff Shameika Moody (hereinafter “Plaintiff”) hereby submits her opposition (“Opposition”) to Defendant Charming Shoppes of Delaware, Inc.’s (hereafter “Defendant” or “Charming Shoppes”) Motion to Dismiss for Lack of Personal Jurisdiction pursuant to FRCP 12(b)(2). As explained in further detail in this Opposition, there is ample evidence that shows that this Court has personal jurisdiction over Defendant. Among the facts supporting personal jurisdiction is that (1) Defendant is the sole entity that has been paying the putative class members wages here in California during the relevant time period (and Plaintiff alleges underpaying these workers), (2) that based on admitted facts by Defendant it is the joint employer of Plaintiff, (3) that Defendant has been sending millions of dollars weekly into California, that Defendant has been paying millions of dollars in California state taxes and also millions of dollars in California disability insurance taxes, (4) that Defendant has been purposefully directing into California thousands of wage statements/paycheck paystubs to thousands of Lane Bryant, Inc.’s alleged employees (and the sister wholly-owned subsidiaries) representing that it is the employer of workers at Lane Bryant, (5) that Defendant has been systematically and purposefully directing thousands of **fraudulent** wage statements/paystubs into California to thousands of California workers and residents over at least four years, and (6) that Defendant is getting the millions of dollars that it admits it pays Lane Bryant workers—presumably from the sales of products by Lane Bryant workers in California.

As set out in more detail below, it is clear that this Court has personal jurisdiction over Defendant and thus, Defendant’s Motion to Dismiss must be denied in its entirety.

II. RELEVANT FACTS

Based on Defendant’s moving papers, there seems to be three (3) relevant parties: Charming Shoppes, Inc. (“CSI”), Lane Bryant, Inc. (“Lane Bryant”), and Defendant Charming Shoppes of Delaware, Inc. (“Defendant” or “Charming Shoppes”). (Declaration of Anthony Camoratto ¶ 2). Furthermore, based on said moving papers, it is Defendant’s contention that both Lane Bryant and Defendant are subsidiaries of CSI and that Defendant is some sort of entity that was

1 created to handle the payroll and other administrative functions of Lane Bryant and CSI's other
2 subsidiaries. (Declaration of John J. Sullivan ¶ 3).

3 Plaintiff Shameika Moody was employed as an hourly paid employee in a "Lane
4 Bryant" retail store located within San Francisco, California. During said employment, Plaintiff was
5 paid her entire wages directly by Defendant "Charming Shoppes of Delaware, Inc." (Declaration of
6 Peter M. Hart, ¶ 2, Exh. A).¹ Plaintiff was not, and never has been, paid by any other entity, including
7 Lane Bryant, Inc. or Charming Shoppes, Inc. Indeed, according to Defendant's own declarations in
8 support of their Motion to Dismiss, such wages to all employees working within Lane Bryant retail
9 stores (and other CSI subsidiary stores) were paid directly out of Defendant's own bank accounts.
10 (Declaration of Anthony Camoratto ¶ 3). Furthermore, the employer's portion of employment taxes
11 for employees working within California Lane Bryant stores (and other employees working within
12 CSI subsidiaries in California) are also paid by Defendant, with Defendant acting as the employer.²
13 (Declaration of John J. Sullivan ¶ 5).

14 Based on the representation made on Plaintiff's wage statements/pay stubs that
15 Defendant is the sole entity that pays Plaintiff, Plaintiff filed this class action suit against Defendant in
16 San Francisco Superior Court. (Hart Decl. ¶¶ 2-6). Subsequent to Plaintiff's filing of said complaint,
17 Defendant's removed this case to this current Court. Immediately thereafter, Defendant filed its
18 original motion to dismiss before Judge Zimmerman, alleging the same identical facts that it has
19 placed before this Court through Defendant's own declarations. Based on such representations and
20 admissions by Defendant, including its contention that Lane Bryant is the actual employer of Plaintiff,
21 a separate class action lawsuit was filed against Lane Bryant in order to preserve the putative class
22 members' rights, particularly with respect to the any issues pertaining to the statute of limitations.
23 (Hart Decl. ¶ 2-6).

24 In addition to the above facts, and what Defendant has not indicated in its moving
25 papers, is the fact that Defendant itself has been sued in another wage and hour class action in 2003

26 _____
27 ¹ The Declaration of Peter M. Hart shall hereinafter be cited to as "Hart Decl. ¶ ____."

28 ² If there is any dispute by Defendant as to this contention, Plaintiff should be allowed discovery to ascertain which California Tax Payer ID Number is used to pay such taxes on behalf of and who is the

1 which it settled in 2004. In the case of *Kozminski v. Charming Shoppes of Delaware, Inc. and*
 2 *Fashion Bug of California, Inc.* (Los Angeles Superior Court Case Number BC 292065) (the
 3 “*Kozminski* matter”), the plaintiff filed a misclassification of employees wage and hour class action
 4 against Defendant and Fashion Bug of California, Inc. (which is purportedly one of CSI’s
 5 subsidiaries). (Declaration of Larry W. Lee ¶ 3).³ In the *Kozminski* matter, Defendant did not dispute
 6 that the California Superior Court lacked personal jurisdiction and did not even raise this defense in
 7 their “Answer to Plaintiff’s Unverified Complaint.” (Lee Decl. ¶ 4). Rather, Defendant availed itself
 8 to the jurisdiction of the California Superior Court. (Lee Decl. ¶ 7). Based on the court records,
 9 Defendant settled the *Kozminski* case. (Lee Decl. ¶ 7). As a result of said settlement, Defendant
 10 further availed itself to the benefits of California law when it received thousands of releases from
 11 California class members. (Lee Decl. ¶ 7). Finally, Defendant further submitted to the continuing
 12 jurisdiction of the California Superior Court as a condition of said settlement. (Lee Decl. ¶ 8).

13 Based on the foregoing, and as further detailed below, Plaintiff requests that
 14 Defendant’s Motion to Dismiss be summarily rejected.

15 III. STANDARD OF REVIEW

16 The Court may exercise jurisdiction over a nonresident defendant whose commercial
 17 activities impact California on a “substantial, continuous and systematic” basis. *Perkins v. Benguet*
 18 *Consolidated Mining Co.*, (1952) 342 U.S. 437, 446-447; *Vons Cos., Inc. v. Seabest Foods, Inc.*,
 19 (1996) 14 Cal. 4th 434. The Court may also exercise jurisdiction over a nonresident defendant when it
 20 is shown that the nonresident defendant purposefully established contacts with the forum state, and the
 21 plaintiff’s causes of action arise out of or is related to defendant’s contacts with the forum state.
 22 *Burger King Corp. v. Rudzewicz*, (1985) 471 U.S. 462, 477-478.

23 California has a “long arm” statute permitting this Court to exercise jurisdiction on any
 24 basis not inconsistent with the Constitution of this state or of the United States. *See* Cal. Code Civ.
 25 Proc. Section 410.10.

26 As will be shown further below, Defendant has admitted to commercial activities on a
 27 _____
 28 employer listed on such Tax Payer ID Number.

substantial, continuous and systematic level in California through its payment of wages to California employees. Furthermore, and as will also be shown below, Defendant has purposefully established contacts with California through its knowing payment of wages to California employees, which this action specifically arises out of. For such reasons, and for other reasons as detailed below, Defendant's motion must be dismissed.

IV. ARGUMENT

A. THERE EXISTS SUBSTANTIAL CONTACTS BETWEEN DEFENDANT AND CALIFORNIA FOR THIS COURT TO CONFER PERSONAL JURISDICTION

The standard of proof on a Rule 12(b)(2) motion without an evidentiary hearing is a "prima facie" standard. *See Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003); *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Here, based on the face of the operative Complaint, personal jurisdiction has been established as Plaintiff's complaint alleges that Defendant is the employer of Plaintiff (Complaint ¶ 8) and has violated various California labor laws (Complaint ¶¶ 8, 11), which are based on the payment of wages. Furthermore, Defendant's own evidence and admissions further establishes personal jurisdiction as Defendant admits that it is the actual and sole entity that pays pay the wages and provides the wage statements/pay stubs to thousands of California employees. *See Sullivan Decl.* at ¶5; *Camoratto Decl.* at ¶6.

Defendant's Motion to Dismiss must therefore fail on its face as there is more than sufficient evidence for personal jurisdiction to be asserted upon Defendant.

1. **Personal Jurisdiction is Established as Defendant is the Joint Employer of Plaintiff and the putative class and of all of the workers it pays wages to.**

First and foremost, based on the face of the operative Complaint, Defendant's current motion must be immediately dismissed. As alleged by Plaintiff in her Complaint filed with this Court, Defendant is the employer of Plaintiff, thus easily establishing personal jurisdiction as Defendant is alleged to be a California employer. Defendant's jurisdictional challenge should be summarily denied and there should be no further argument. Or, at a minimum, since Plaintiff has alleged a fact

³ The Declaration of Larry W. Lee shall be cited to as "Lee Decl. ¶ ____."

supporting jurisdiction in her Complaint, and this fact must be viewed as true for purposes of pleading, Defendant should not be allowed to introduce facts outside of the Complaint and Plaintiff requests the opportunity to do discovery to show jurisdiction exists.

Notwithstanding the above, there is sufficient evidence that this Court can properly assert personal jurisdiction over Defendant as **Defendant is the presumptive employer of Plaintiff and the putative class members.** Labor Code § 226 (a) states, in pertinent part:

Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee ... (5) net wages earned, ... (8) **the name and address of the legal entity that is the employer** ...

Cal. Lab. Code § 226(a) (emphasis added). As shown on the wage statement/pay stub that Plaintiff received, Defendant boldly sets forth its name “Charming Shoppes of Delaware, Inc” and its Pennsylvania address on the wage statement/pay stub as the sole entity that is paying the wages of Plaintiff.

Furthermore, based on the declarations submitted by Defendant, Defendant’s name is also the sole entity that appears on the putative class members’ wage statements/pay stubs as well. Thus, based on Labor Code § 226(a), Defendant is the presumptive employer of thousands of putative class members, which are also Defendant’s California employees, and thereby establishes more than sufficient minimum contacts with California to establish personal jurisdiction. *See Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 961 (2005) (finding that where the wage statements failed to list either the employer’s name or address are improper wage statements and automatic violations of Labor Code § 226).

The fact that these California workers are the employees of Defendant shows that Defendant can exercise jurisdiction over Defendant as the acts of the employees of a nonresident are imputed to the employer. *See Ochoa v. J.B. Martin & Sons Farms, Inc.*, (287 F.3d 1182, 1189 (9th Cir. 2002).

2. Defendant, Even if It is Not Considered the Employer, Has Sufficient Systematic and Continuous Contacts With California Based on Its (a) Purposefully Directed

1 **Activities into California, (b) Agent-Principal, Parent-Subsidiary, Alter-Ego, Co-Conspirator,**
 2 **and (c) Generally the Benefits It Takes Out of California.**

3 *(a) Personal Jurisdiction is Established Because Defendant Purposefully Directs*
 4 *Activities Into California in the Form of Thousands of Wage Statements/Paycheck Paystubs and*
 5 *Payment into California of Millions of Dollars to California Workers and to the Forum State.*

6 Defendant itself has had **significant** systematic and continuous contacts with California
 7 through its consistent contacts with California employees/workers (even if these workers are not the
 8 employees of Defendant) on a weekly or bi-weekly basis over years. As admitted to by Defendant, it
 9 directly issues the putative class members' wages directly to the putative class members in California
 10 without any involvement from any other party. Presumably, this happens on a weekly or bi-weekly
 11 basis. Furthermore, based on the removal papers of Defendant that sets out the number of Lane
 12 Bryant employees in California and based on a simple bi-weekly pay period for these employees,
 13 Defendant Charming Shoppes of Delaware, Inc. has directed and issued, at the very least, over one
 14 hundred thousand itemized wage statements and over one hundred thousand paychecks into California
 15 during the relevant time period.⁴ Under this scenario, Defendant has had significant contacts on a
 16 consistent basis within California, sufficient to establish personal jurisdiction.

17 Defendant has further admitted that it pays the employment taxes of the putative class
 18 members, presumably with Defendant listed as the actual employer paying such employment taxes,
 19 including the employer's portion.⁵ By consistently paying employment taxes into California, and
 20 thereby purposefully availing itself to the benefits provided by such, Defendant has caused itself to
 21 have substantial contacts with California, thereby allowing this Court to assert personal jurisdiction
 22 over Defendant. From the paystub of Plaintiff, Defendant also appears to pay SDI (State Disability
 23 Insurance) taxes to California. Indeed, using Defendant's argument of lack of personal jurisdiction, if

24 _____
 25 ⁴ These numbers are based upon Defendant's assertion in its removal papers that Lane Bryant, alone,
 26 averages approximately 1,037 non-managerial non exempt employees per year and 52 managerial
 27 non-exempt employees per year. Based on a bi-weekly payroll system, this would amount to 113,256
 28 pay checks for the statutory 4 year period ((1,037+52) x 26 pay periods per year = 28,314 x 4 years =
 113,256 pay checks. and wage statements for the class period).

⁵ This is yet another reason to allow further discovery as to which entities are the actual employers of
 the putative class members.

1 it was underpaying California payroll taxes or disability insurance taxes for these thousands of
 2 California workers, the California Franchise Tax Board would have no jurisdiction to enforce proper
 3 payment in a California court.

4 For all of these reasons, at a minimum, personal jurisdiction exists over Defendant as
 5 Defendant “purposefully directs” activities on a grand scale into California toward forum residents,
 6 Plaintiff’s causes of action for underpayment of wages and wages owed arises out of or results from
 7 Defendant’s actions, and it is “reasonable and comports with fair play and substantial justice” for this
 8 forum to exercise personal jurisdiction over Defendant. *See Burger King Corp. v. Rudzewicz*, 471
 9 U.S. 462, 477-478 (1985); *Hanson v. Denckla*, 357 U.S. 235, 253-254 (1958); *Calder v. Jones*, 465
 10 U.S. 783, 790 (1984) (courts readily find connection sufficient to convey jurisdiction where
 11 nonresident defendants purposefully direct activities into forum that have effects on forum residents);
 12 *see also Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399 (9th Cir.
 13 1986)(harm to California residents by purposefully directed actions created personal jurisdiction).

14 Defendants by also having a “continuous relationship” over years by directing wage
 15 statements, paying California taxes, and paying wages to California workers—and underpaying these
 16 wages as alleged by Plaintiff, subjects Defendant to jurisdiction by this Court. *See Roth v. Garcia*
 17 *Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) (continuing and extensive involvement with the forum
 18 conveys jurisdiction); *Ballard v. Savage*, 65 F.3d 1495, 1498-1499 (9th Cir. 1995) (bank participating
 19 in “Ponzi” scheme in forum allowed for personal jurisdiction by forum).

20 Indeed, even a single act may be sufficient, and here Plaintiff can show and Defendant
 21 admits to thousands of acts on a monthly basis and over many years to thousands of California
 22 residents in California. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

23 Furthermore, if it is later discovered that Defendant is the entity which represents itself
 24 to California as the employer for tax payment purposes, it would be convincing evidence that
 25 Defendant is the employer and thereby establish sufficient contacts for personal jurisdiction purposes.

26 ***(b) Agent-Principal, Alter-Ego, Parent-Subsidiary, Co-Conspirator Theories Show***
 27 ***Personal Jurisdiction***

1 Defendant at a minimum is in an admitted agent-principal relationship with Lane
 2 Bryant such that the acts of the workers of the agent, Lane Bryant workers, can clearly be imputed to
 3 the principal, Charming Shoppes. *See Ochoa v. J.B. Martin & Sons Farms, Inc.*, (287 F.3d 1182, 1189
 4 (9th Cir. 2002); *see also Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300,
 5 314 (2nd Cir. 1981).

6 Defendant is in such a close relationship with Lane Bryant as it is recycling money it
 7 receives from thousands of California workers who work at Lane Bryant and its sister subsidiaries and
 8 keeping profits from the efforts of these thousands of employees and keeping profits from the sales of
 9 goods of these California workers—it then pays these California workers from the sales of goods
 10 made by them in California. *See Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328
 11 F.3d 1122, 1134-1135 (9th Cir. 2003) (subsidiary was established for or is engaging in activities that,
 12 but for the existence of the subsidiary, the parent would have to undertake). No one else is paying the
 13 putative class members, and Defendant gets this money to pay California workers from somewhere
 14 other than “thin air”—undoubtedly from the activities of thousands of California workers. If
 15 Defendant were to prevail in its assertion that it is not the employer, it would create the avenue for a
 16 perfect scheme: have thousands of workers in California (or the United States), realize monetary gain
 17 from the systematic and continuous activities of these workers, take millions of dollars in profits out of
 18 California (or the United States), send into California (or the United States) thousands of payroll
 19 documents systematically, pay state taxes in California (or elsewhere in the United States)—but if it is
 20 sued, then allege no personal jurisdiction, and indeed no personal jurisdiction anywhere in the United
 21 States if it resides in the Cayman Islands, for example. *See Certified Building Products, Inc. v. NLRB*,
 22 528 F.2d 968, 969 (9th Cir. 1976) (court may pierce the “corporate veil” jurisdictionally to attribute
 23 contacts); *see also Textor v. Board of Regents of No. Ill. Univ.*, 711 F.2d 1387, 1392 (7th Cir. 1983)
 24 (contacts of co-conspirator of defendant may be imputed to nonresident defendant).

25 Defendant admits that it is the subsidiary of CSI—and Defendant takes the money and
 26 pays the wages for all of CSI’s subsidiaries. Accordingly, the argument can be made that the actions
 27 of Lane Bryant workers should be imputed to Defendant to establish jurisdiction under the theories of

parent-subsidary activities, alter-ego, and co-conspirator.

Further, and logically, if Defendant is the sole payer of wages to workers at Lane Bryant, Inc. what money does Lane Bryant have to pay a judgment—presumably none as the millions of dollars leaves Lane Bryant or was never in its possession but is controlled by Defendant—or possibly even controlled by Charming Shoppes, Inc. Using Defendant’s facts, Lane Bryant is a shell without any money as that money is controlled by Defendant.

3. There is Personal Jurisdiction as Defendant Has and Is Directing Fraudulent Activities Into California.

Given that Defendant is not disclaiming the presumptive fact that it is the employer of the putative class members, this purported admission would automatically give rise to fraudulent activity being asserted by Defendant into California. As stated above, Cal. Lab. Code § 226(a) requires the actual employer’s name to be stated on the employee’s wage statement/pay stub. Here, by placing Defendant’s name as the sole entity on the putative class members’ wage statements/pay stubs, and by now proclaiming that Defendant is not the employer of said putative class members, Defendant has intentionally made false statements regarding who is the actual employer, thereby causing significant confusion to the putative class members, as exhibited by the current situation the parties are in with this current Motion to Dismiss.

Thus, by its own admission, Defendant has admitted to asserting fraudulent activities into California, and also systematically and continuously committing a statutory violation of California Labor Code 226 and systematically and continuously violating California Business & Professions Code 17200 which prohibits such unfair, unlawful, fraudulent, and misleading activities. Under established case law, when a company directs such fraudulent communications and activities into a forum state, then that forum state has personal jurisdiction over it. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (purposefully directing activities into the forum state to forum residents confers personal jurisdiction); *see also McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (single act may suffice to confer personal jurisdiction); *Hess v. Pawloski*, 274 U.S. 353 (1927) (directing fraudulent activities into the state); *Lundgren v. Superior Court*, 111 Cal. App. 3d 477, 484 (1980)

(directing liability producing actions into the forum state); *Quattrone v. Superior Court*, 44 Cal. App. 3d 296, 303 (1975). Furthermore, Plaintiff is contemporaneously with this Opposition amending her Complaint to add class wide claims for fraud and misrepresentation and violation of California Business & Professions Code Section 17200 against Defendant, which prohibits such unfair, unlawful, fraudulent, and misleading activities.⁶ (See Hart Decl. ¶ 9, Exh. “B”)

4. Defendant Has Previously Consented to Personal Jurisdiction by California Courts and Has Waived the Defense that it is Now Asserting.

Finally, and which Defendant strikingly fails to mention in its moving papers or its supporting declarations, is the fact that Defendant has been sued in a similar type of wage and hour class action in California, particularly at the Los Angeles Superior Court. In the *Kozminski* matter, Defendant did not dispute that the California Superior Court lacked jurisdiction over it. Rather, Defendant consented to the jurisdiction of the California Superior Court. See *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 786 (5th Cir. 1990). Plaintiff would argue that Defendant Charming Shoppes’ failure to raise personal jurisdiction as a Defense in the *Kozminski* case shows that Defendant has consented to jurisdiction in this forum state—and that this defense is waived. Furthermore, as part of the settlement reached in the *Kozminski* matter, Defendant received releases under California law from class members and further consented to the jurisdiction of the California Superior Court. Thus, Defendant has further availed itself to the benefits of California law and the California courts, further evidencing substantial contacts with California. As the United States Supreme Court has held, a non-resident defendant that purposefully avails itself to the benefits and protections of the forum state subjects itself to the personal jurisdiction of such forum state. *Hanson v. Denckla*, 357 US 235, 253 (1958). Furthermore, and what is most glaring about this is the fact that defense counsel in the current case was also the defense counsel in the *Kozminski* case. It thus leads

⁶ In addition, it should be noted that Plaintiff intends on adding Lane Bryant as an additional defendant, including a claim for violation of Cal. Lab. Code § 226(a). Plaintiff would also seek immediate class certification and summary judgment against all Defendants for such admitted wholesale violation of Cal. Lab. Code § 226(a). See *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 961 (2005) (finding that where the wage statements failed to list either the employer’s name or address are improper wage statements and automatic violations of Labor Code § 226); see also *Cornn v. United Parcel Service, Inc.*, 2006 U.S. Dist. LEXIS 9013, *10-11 (N.D. Cal.

1 one to wonder why defense counsel did not identify this fact in its own declaration.

2 By its own admissions, Defendant has not only minimum and such systematic contacts
3 to satisfy the standards of personal jurisdiction, **Defendant has indeed significant contacts with**
4 **California.** It would appear that the primary purpose of Defendant Charming Shoppes making this
5 jurisdictional challenge, that on facts that it admits has no basis, is so that Charming Shoppes can
6 attempt to narrow this case down to only a case against Lane Bryant, Inc. and thus limit the size of the
7 putative class to not include Catherines Plus Sizes, Lane Bryant, Inc., Fashion Bug, Petite Sophisticate
8 Outlet, and Crosstown Traders, Inc., other affiliates mentioned in Defendant's certificate of interested
9 entities for which Defendant pays the employee wages and provides other services.

10 **B. DEFENDANT HAS FAILED TO PROVIDE ANY SUFFICIENT REASON TO**
11 **DISPUTE PERSONAL JURISDICTION**

12 Defendant attempts to explain this issue by contending that Defendant is only the
13 "payroll master" for CSI's subsidiaries. In other words, Defendant is contending that it is some sort of
14 "administrative arm" of CSI, with part of its functions as processing the payroll for CSI and its
15 subsidiaries. *See Amoco Egypt Oil Co., v. Leonis Navigation Co.*, 1 F.3d 848, 851 (9th Cir. 1993)
16 (burden on defendant to show unreasonableness).

17 This is not a plausible explanation as Defendant is still the sole entity that appears on
18 the putative class members' wage statements/pay stubs setting itself out as the employer, and, thus, is
19 the presumptive employer. Defendant's explanation simply fails to describe why the name "Lane
20 Bryant" does not appear on the wage statement/pay stub. Indeed, Defendant is trying to portray itself
21 as some sort of "payroll service" for Lane Bryant and its employees, such as other payroll services like
22 ADP or Paychex. However, based on Plaintiff's counsel's own experience of reviewing a variety of
23 wage statements/pay stubs, when employers use payroll services such as ADP or Paychex, the
24 employer's name still appears on such wage statement/pay stub, not the name of the payroll service.
25 (Lee Decl. ¶¶ 9 & 10). Thus, Defendant's explanation that it is the "payroll master" of CSI's
26 subsidiaries should be rejected.

27
28 2006); *Wang v. Chinese Daily News, Inc.*, 435 F.Supp.2d 1042 (2006).

1 **C. ASSERTING PERSONAL JURISDICTION OVER DEFENDANT IS REASONABLE**

2 Defendant further argues in its moving papers that asserting personal jurisdiction over
 3 Defendant would be unreasonable and unfair. However, Defendant fails to provide any plausible
 4 explanation for this argument. Rather, what would be unfair would be to require low wage California
 5 employees to travel to Pennsylvania to file suit against Defendant for any wage payment problems
 6 California employees suffer, such as in this particular case. Indeed, Defendant is owned by a
 7 corporation that has numerous subsidiaries operating in California. Defendant itself consistently
 8 communicates with California employees on a weekly or bi-weekly basis through the issuance of
 9 wages. *See Burger King Corp. v. Rudzewicz*, 471 U.S. at 477 (if a nonresident has significant
 10 activities within the forum state “it is presumptively not unreasonable to require him to submit to the
 11 burdens of litigation in that forum as well”; if defendant “purposefully has directed his activities at
 12 forum residents . . . he must present a compelling case” that the exercise of jurisdiction would be
 13 unreasonable); *see also Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). For such reasons, it is
 14 quite reasonable for this Court to assert personal jurisdiction over Defendant. *See Amoco Egypt Oil*
 15 *Co., v. Leonis Navigation Co.*, 1 F.3d 848, 851 (9th Cir. 1993) (burden on defendant to show
 16 unreasonableness).

17 **D. PLAINTIFF’S FILING OF A SEPARATE CLASS ACTION AGAINST LANE**
 18 **BRYANT HAS NO BEARING ON THIS CURRENT MOTION**

19 As Defendant has pointed out, Plaintiff has filed a separate class action against Lane
 20 Bryant, Inc. in San Francisco County Superior Court. While this should have no bearing on the
 21 current Motion to Dismiss, Plaintiff did this only after Plaintiff first received Defendant’s personal
 22 jurisdiction challenge, in which it represented that Lane Bryant, Inc. was Plaintiff’s actual employer.

23 Naturally relying upon such representation, and in order to preserve the putative class
 24 members’ statute of limitations, Plaintiff immediately filed a separate class action lawsuit solely
 25 against Lane Bryant.⁷ Indeed, if this Court were to conclude that Defendant has no personal
 26 jurisdiction, then Defendant and Lane Bryant would have benefited by their deception by cutting off

27 _____
 28 ⁷ Plaintiff filed the complaint in an abundance of caution. However, Plaintiff would prefer to have the

1 more than 30 days of statute of limitations liability for the putative class members.

2 However, now to conserve judicial resources, and to avoid inconsistent rulings on
3 issues such as personal jurisdiction, and who is the employer of Plaintiff, Plaintiff intends to (i) add
4 Lane Bryant, Inc. as a Defendant to this action as a joint and integrated employer of Plaintiff and the
5 putative class, (ii) add Charming Shoppes, Inc., which Plaintiff has been notified wholly owns Lane
6 Bryant, Inc. as a subsidiary, and (iii) add claims for fraud, misrepresentation, violation of statute, and
7 unfair practices claims against Defendant Charming Shoppes.

8 For such reasons, Plaintiff's filing of the separate class action should have no bearing
9 on the substantive issues in this current motion.

10 In addition, Plaintiff has contemporaneously with this Opposition filed a First Amended
11 Complaint with this Court that adds Lane Bryant, Inc. as a defendant, Charming Shoppes, Inc. as a
12 Defendant and adds further facts that allege jurisdiction, and that alleges additional claims against
13 Charming Shoppes of Delaware, Inc. (*See* Hart Decl., ¶ 9, Exh. "B") Indeed, by filing these
14 additional claims for fraud and unfair practices against Defendant, Plaintiff is asserting further grounds
15 and facts that support this Court having personal jurisdiction over Defendant.

16 **E. PLAINTIFF SHOULD BE ALLOWED FURTHER DISCOVERY TO ESTABLISH**
17 **PERSONAL JURISDICTION**

18 While the standard of proof on a Rule 12(b)(2) motion without an evidentiary hearing is
19 a "prima facie" standard, if this Court is inclined to grant Defendant's Motion to Dismiss, and since
20 the discovery phase has not commenced in this case, Plaintiff requests that an evidentiary hearing on
21 this matter and the right to take discovery on the issue. *See Data Disc, Inc. v. Systems Tech. Assocs.,*
22 *Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1271 n. 12
23 (5th Cir. 1983).

24 Based on the evidence and declarations submitted by Defendant, there seems to exist
25 sufficient evidence that Defendant could likely be a joint employer or "integrated enterprise" with CSI
26 and/or Lane Bryant. *See Kang, v. U. Lim America, Inc.*, 296 F.3d 810 (9th Cir. 2002) (holding that

27
28 state court action stayed. (*See* Hart Decl. ¶3-8).

1 integrated enterprise is based on the established test involving four factors: (1) Interrelation of
2 Operations, (2) Common Management, (3) Centralized Control of Labor Relations, and (4) Common
3 Ownership or Financial Control); *see also Parker v. Columbia Pictures Ind.*, 204 F.3d 326 (2nd Cir.
4 2000) (holding Sony Pictures Entertainment to be the employer and Columbia Pictures also the
5 employer).

6 Through its supporting declarations, Defendant admits that besides paying the wages of
7 Lane Bryant workers (and the wages of other CSI subsidiaries), Defendant also provides “legal
8 consultation” and other administrative functions. *See Sullivan Decl.* at ¶3. Furthermore, Defendant
9 shares the identical location of its corporate headquarters. Under such circumstances, it could
10 certainly evidence common management and thus an integrated enterprise. These admitted facts by
11 themselves essentially establish that it is the employer of Plaintiff and the putative class members.
12 *Kang*, 296 F.3d 810. Indeed, the *Kang* case deal with precisely the exact same issues such as common
13 payroll and common management and services, including holding that the test factor of interrelations
14 of operations is established by a “wholly owned subsidiary” fact, another fact that Defendant has
15 admitted to.

16 Further, Plaintiff should also be allowed to conduct discovery regarding the parent
17 subsidiary relationship that is admitted by Defendant to establish an “alter ego” between Defendant
18 and Lane Bryant for purposes of conferring personal jurisdiction. *See Harris Rutsky & Co. Ins.*
19 *Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134-1135 (9th Cir. 2003); *see also Certified*
20 *Bldg. Prod., Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1976).

21 Other issues that need to be resolved before this Motion to Dismiss can be properly
22 considered by this Court include issues such as, but are not limited to, (1) whose employer tax
23 identification number is used to pay the employment taxes, (2) where does Defendant get its monetary
24 funds to pay the wages to the putative class members if indeed the retail stores and employees are
25 managed, operated and employed by Lane Bryant, and (3) the specific details regarding the inter-
26 relationships between Defendant, CSI, Lane Bryant, and the other subsidiaries of CSI. As clearly
27 shown, there are significant issues to be answered by Defendant and the relevant parties before it can
28

1 For the reasons set forth above, Defendant's Motion to Dismiss should be denied in its
2 entirety as there is sufficient evidence to establish personal jurisdiction over Defendant in this forum
3 and by this Court.

4
5 **Dated: January 18, 2008**

LAW OFFICES OF PETER M. HART

6
7 **By: _____ / s / _____**
8 **Peter M. Hart, Esq.**
9 **Attorney for Plaintiff and the class**